IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.09.2006

CORAM

THE HONOURABLE MR.JUSTICE P.SATHASIVAM
AND
THE HONOURABLE MR.JUSTICE S.MANIKUMAR

WRIT APPEAL No.1441 OF 1998

1.Government of Tamilnadu
rep. by its Commissioner &
Secretary to Government,
Education Department,
Fort St. George,
Madras - 9.

2.The Director of School Education,
DPI Compound, College Road,
Madras - 6. … Appellants/Respondents 1 and 2

Vs.

1.S.Kadirvelu

2.The Correspondent,
YMCA Higher Secondary School,
Nandanam, Madras - 35. …
Respondents/Petitioner and 3rd Respondent

Prayer : Writ Appeal is filed against the order passed by the learned Single Judge in W.P.No.14676 of 1992 dated 23.02.1998.

For Appellants : Mr.C.Thirumaran,
Government Advocate

For R1 : Mr.G.Nagarajan

For R2 : No appearance

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J U D G M E N T

Writ Appeal is directed against the order of the learned Single Judge directing respondents 1 and 2 therein, to sanction a post of PG teacher in English subject for the third respondent school with effect from the date of upgradation as a Higher Secondary School, fit in the writ petitioner as P.G. teacher in

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English subject and pay all arrears of salary with 12% interest.

2. The brief facts leading to the filing of the Writ Appeal are as follows:

(i) The first respondent/petitioner obtained his M.A. Degree in English in the year 1973 and joined the second respondent school herein, on 21.08.1978. Later on, he acquired B.Ed. Degree in the year 1980. The Government of Tamilnadu by its order, introduced the new system of Plus Two in the Schools throughout the State and in G.O.Ms.No.2466 Education, dated 19.11.77, upgraded about 800 High Schools as Higher Secondary Schools in the academic year 1978-79. For the purpose of implementation of Higher Secondary Education in the Schools, the Government in G.O.Ms.No.1091 Education, dated 16.05.1978, prescribed qualifications for the teaching staff in Higher Secondary Schools. As per the Government Order, teachers handling Higher Secondary classes shall possess P.G. degree in the particular subject to be handled in Higher Secondary Schools with the training of qualification of B.Ed or B.T.

(ii) If sufficient number of teachers with a P.G. Degree are not available, B.T. teachers working in High Schools may be permitted to handle Higher Secondary Classes in the subjects, in which they have obtained a basic Degree. An induction allowance for these teachers will be paid per month and that they will be entitled to a scale of pay of a Higher Secondary class teacher, only after they acquire Post-Graduate qualification in the required subject, in addition to B.Ed qualification.

(iii) Though, the petitioner was qualified to be appointed as Post-Graduate teacher in English subject in the second respondent school, he was not appointed on the ground that the post of P.G. teacher in English subject was not sanctioned by the Government. Only three posts of P.G. teachers in Economics, Accountancy and Physical Education were sanctioned. The post of P.G. teacher in Economics was not filled up as there was no adequate intake of students. The first respondent/petitioner made several representations to the appellants, to convert the post of Economics to English subject, but the said request was not complied with, as the management had availed the post later on. The management has also not taken up the issue with the Government for sanctioning of P.G. teacher post in English, though the number of students in English and Tamil were more than 100. The sanctioning of the post will not have financial impact, since 40 schools were upgraded during 1984-85 and many posts of P.G. teachers were also sanctioned for various schools.

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(iv) The petitioner has been taking classes for students in English subject from 1985 onwards and that he has been paid only an induction allowance of Rs.40/-. Inasmuch as he was qualified to handle English subject and that there was continuous requirement to take classes in English for students in Higher Secondary classes, the post ought to have been sanctioned. Left with no other alternative, the first respondent/petitioner has filed a Writ of Mandamus directing the appellants to sanction the post of English teacher from the date of upgradation, fit him to the said post and pay the arrears of scale of pay.

(v) The Appellants filed a counter affidavit in the Writ Petition contending inter alia that though the Government sanctioned three posts of P.G. teachers in Commerce, Economics and Physical Education, the Government has not sanctioned P.G. teacher post in English, when the school was upgraded, vide G.O.Ms.No.1774 Education, dated 09.11.1984. As regards the teaching of subjects, English and Tamil in the XII standard, the Government ordered that the services of the existing teachers in the Higher Secondary schools should be utilised and that the teachers would be entitled to only the special pay of Rs.40/- per month.

(vi) As per paragraph 2(b) of G.O.Ms.No.1091, Education, dated 16.05.1978, if sufficient number of teachers with P.G. qualification mentioned therein are not available, B.T. teachers working in High Schools may be permitted to handle Higher Secondary classes in the subjects in which they have obtained a basic degree and these teachers my be permitted on conditions that (i) they shall be entitled to the scale of pay for Higher Secondary Course to be prescribed in due course only if and after they acquire Post Graduate qualification in the required subject, hereafter, in addition to the B.Ed. qualification and (ii) they will become ineligible to handle Higher Secondary Classes when a person with a Post-Graduate qualification in the required subject B.Ed./M.Ed. becomes available.

(vii) The appellants further contended that although the first respondent/petitioner is in possession of Post Graduate Degree in English, he cannot force the Government to sanction a P.G. post on a regular scale of pay in English subject. If the said request is accepted, all teachers, who possess P.G. qualification in different subjects will demand P.G. post in their respective subjects, in order to get promotion, which cannot be met by the Government. Posts are sanctioned to the schools, taking into account various factors, such as academic interest, financial position of the State and that the posts are not sanctioned to the Higher Secondary Schools just to increase

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the promotional averments. Since the School has introduced the subjects, Economics, Accountancy in the Higher Secondary level, Government sanctioned two posts of P.G. Assistants, one in Economics and Commerce (besides one post of P.G. teacher in Physical Education) in the interest of the student community. Since English and Tamil subjects can be taught by the teachers working in High Schools, the Government in G.O.Ms.No.1774, Education, dated 09.11.1984 has ordered to utilise the services of the existing teachers in the schools for taking classes in the above said subjects with a special pay of Rs.40/-. Even if a B.T. teacher possesses P.G. qualification, he cannot be promoted as P.G. Assistant in the absence of a post. Since no post was sanctioned in English subject, the services of the first respondent/petitioner was utilized for handling Higher Secondary classes in English subject for which, he was granted special pay. The creation of a post of PG teacher in the time scale of pay is an expenditure to the Government. Further, no such proposals have been received from the third respondent school for creation of P.G. teacher post. Even the management has informed the department that the first respondent/petitioner was a satisfactory teacher.

(viii) The first respondent/petitioner has filed a rejoinder to the counter affidavit, contending inter alia that the services of the first respondent/petitioner has been exploited by the management from 1985 onwards and that he had been paid only a meagre sum of Rs.40/- as special pay. The averments relating to poor intake is not untenable as the school had satisfied the economic strength, viz., 15 in the subject, as prescribed by the Government. There are more number of students in English and Tamil subjects and there is need for sanctioning a post in English subject. He has also refuted the allegations made by the management and that he has maintained a good records of service with 80% pass in English subject, for over 10 years.

(ix) Learned Single Judge considering the rival submissions and the materials on record, directed the Government to sanction English teacher post from the date of upgradation and consequently fit the first respondent/petitioner in the said post in the scale of pay to be paid from the date of upgradation. Aggrieved by the same, the Writ Appeal has been filed.

3. Mr.S.Thirumaran, learned Government Advocate for appellants contended that inasmuch as no post of P.G. Assistant has been sanctioned, the question of considering the first respondent /petitioner in the said post as per G.O.Ms.No.1091, Education, dated 16.05.1978 does not arise. He further contended that only two posts of P.G. Assistants, in Economics and Commerce

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were sanctioned, besides one post of P.G. Assistant in Physical Education and all the posts have been utilised. He further submitted that the Government has got the right to create a post, subject to its financial position and also the need for creation. According to him, the condition in the Government Order that Higher Secondary classes shall be handled only by P.G. teachers and only if no P.G. teachers are available, Graduate teachers can be allowed to handle classes, till they acquire P.G. Degree, will not automatically confer a right for creation of a P.G. Assistant in English subject. Even, if the services of the first respondent/petitioner have been utilised to take Higher Secondary classes, he is not entitled to the scale of pay for a P.G. teacher, inasmuch as the question of payment of scale of pay arise only if there is a sanction of post.

4. Learned Government Advocate further submitted that the learned Single Judge has misapplied G.O.Ms.No.1091, dated 16.05.1978, which prescribes only qualifications for the teachers. The power to create or abolish a post is purely the prerogative right of the Government depending upon the exigencies, circumstances, administrative necessity, besides involving financial implications and nobody has got the right to seek for a Writ of Mandamus to sanction a post.

5. Learned counsel for the first respondent reiterated the contentions made in the writ petition and submitted that the second respondent school ought to have sanctioned the post of P.G. teacher in English subject, when there was adequate student strength and constant need. He further submitted that when the Writ Appeal was admitted, a direction was issued to the appellants to sanction a P.G. teacher post in the school from the date of its upgradation as Higher Secondary School. Pursuant to the same, the Government has issued orders in G.O.Ms.No.422, School Education HS(2) Department, dated 27.11.1998 and created a post of P.G. teacher in English subject in the respondent school from the date of upgradation of the school as a Higher Secondary School and that the first respondent has also been fit in to the said post and was paid salary for the period. Learned counsel for the first respondent further submitted that the first respondent/petitioner has retired from service and made a request that the arrears of salary and allowances, consequent to the pay commission revision may be ordered.

6. We have perused the materials and considered the rival contentions. G.O.Ms.No.1091 deals with the qualifications in the post of P.G. teachers. Clause 2(a) and 2(b) of the Government Order deals with the qualifications. It is clear from the said Government Order, that the appointment of B.T. teachers working in the schools were permitted to handle Higher Secondary classes for the students, in which they have obtained a basic Degree and

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the appointment is purely on temporary basis, subject to the availability of P.G. teachers. That by itself will not confer any right on the teachers to seek for creation of further posts to improve their promotional chances. Creation/sanctioning of a post, depends upon various factors such as academic interest, need for creation, financial implications, etc. and it is the prerogative right of the Government, which involves financial implications. In this context, it is useful to refer to the decisions of the Honourable Supreme Court.

(i) In a decision reported in M.Ramanatha Pillai vs. State of Kerala (1973 (2) SCC 650), in paragraph 14, the Supreme Court has held as follows :

> "The power to create or abolish a post is not related to the doctrine of pleasure. It is a matter of governmental policy. Every sovereign Government has this power in the interest and necessity of internal administration. The creation or abolition of post is dictated by policy decision, exigencies of circumstances and administrative necessity. The creation, the continuance and the abolition of post are all decided by the Government in the interest of administration and general public."

(ii) In a decision reported in Dr.N.G.Singhal vs. Union of India and others (1980 (3) SCC 29), in paragraph 18, Supreme Court has held as follows :

> "18. …. The Court would be the least competent in the face of scanty material to decide whether the government acted honestly in creating a post or refusing to create a post or its decision suffers from mala fide, legal or factual. "

(iii) In a decision reported in (The Commissioner, Corporation of Madras, vs. Madras Corporation Teachers' Mandram and others) AIR 1997 SC 2131), the Apex Court reversed the decision of the Tribunal directing the Government to create a post. Paragraph 4 reads as follows :

> "It is well settled legal position that it is the legal or executive policy of the Government to create a post or to prescribe the qualifications for the post. The Court or Tribunal is devoid of power to give such direction. The impugned direction, therefore, is clearly illegal."

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The decisions referred to above, clearly earmark the power of the Court in creation or abolition of a post. Therefore, the directions of the learned single Judge to create the post of P.G. teacher in English subject in the second respondent school, with effect from the date of upgradation, fit in the first respondent to the post and consequently to pay the arrears of pay to him with interest are liable to be set aside.

7. The contention of the learned counsel for appellants that if the teachers possessing P.G. qualification in different subjects in various schools are to be fit in to the respective subjects, by creation/sanctioning of posts, then there will be a demand in all schools, which will certainly burden the Government, is also accepted. It is purely the executive domain to create or abolish a post. The only point to be considered is as to whether the first respondent can be paid arrears of scale of pay consequent to the implementation of the pay commission report. Pursuant to the interim order made in this Appeal, the Government has sanctioned the post of P.G. teacher in the second respondent school, vide G.O.Ms.No.422 School Education (HS-2) Department, dated 27.11.1998. In paragraph 4 of the said Government Order, it is stated that the revision of scale of pay and other allowances will be applicable to the post, which is created as per clause 3 of the Government Order. In the light of the Government Order, creating a post and the affirmative decision of the Government that the post is entitled to revision of scale of pay, a direction is issued to the appellants to pay the arrears of salary, consequent to the revision of scale, as per Pay Commission Reports. This direction is issued on the facts of this case and it is not to be construed as a precedent.

In all other respects, the order of the learned Single Judge and the directions contained therein are set aside

In the result, the Writ Appeal is allowed with the above directions. No costs. Consequently connected C.M.P.Nos.12996, 12997 of 1999 and 15718 of 1998 are closed.

Sd/
abe Asst.Registrar

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Sub Asst.Registrar

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To

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of Tamil Nadu
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3. The Correspondent,
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